No. 00-1715

In the Supreme Court of the United States

GOVINDBHAI M. PATEL, PETITIONER

v.

MICHAEL HESTON, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is statutorily ineligible for the discretionary relief of suspension of deportation under 8 U.S.C. 1254(a)(1) (1994) because he was statutorily precluded from accruing the requisite seven-year period of continuous physical presence in the United States after the Immigration and Naturalization Service served him with an Order to Show Cause commencing his deportation proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A11-A14) is unpublished, but the decision is noted at 242 F.3d 376 (Table). The opinion of the Board of Immigration Appeals (Pet. App. A4-A10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2000. A petition for rehearing was denied on February 15, 2001 (Pet. App. A15). The petition for a writ of certiorari was filed on May 15,

2001. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 9, 1989, petitioner entered the United States as a non-immigrant visitor for pleasure. Certified Administrative Record (C.A.R.) 443. Petitioner was authorized to remain in the United States only until March 7, 1990, but he remained here past that date. *Ibid.* On April 6, 1990, the Immigration and Naturalization Service (INS) served on petitioner an Order to Show Cause (OSC), charging petitioner with deportability under then-Section 241(a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2) (Supp. II 1990), as a non-immigrant who remained in the United States longer than permitted. C.A.R. 443-444. At the time that the INS served the OSC, petitioner had been in the United States for seven months.

In his deportation proceedings, petitioner initially applied for asylum and withholding of deportation. C.A.R. 370-375. On December 10, 1992, the immigration judge (IJ) denied petitioner's applications, finding among other things that petitioner had presented false testimony in support of his applications, and concluding that petitioner had failed to satisfy his burden of proving his eligibility for the relief sought. C.A.R. 201. The IJ granted petitioner voluntary departure, and in the alternative ordered petitioner deported to India. C.A.R. 200.

2. Petitioner appealed from the IJ's decision to the Board of Immigration Appeals (BIA). On January 29, 1997, petitioner filed with the BIA a motion to remand the case to the IJ so that he could apply for the discretionary relief of suspension of deportation under then-Section 244(a)(1) of the INA, 8 U.S.C. 1254(a)(1) (1994).

See C.A.R. 23-59. Under INA Section 244(a)(1), the Attorney General had the authority to suspend the deportation of an alien who (as pertinent here) had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application for suspension, who proved that during all of that period he was a person of good moral character, and whose deportation would result in extreme hardship to the alien or to his citizen or lawful permanent resident alien spouse, parent, or child. See 8 U.S.C. 1254(a)(1) (1994). By the time petitioner filed that motion to remand with the BIA, he had been in the United States for seven years.

The INS opposed petitioner's motion to remand, on two grounds pertinent here. First, during the pendency of petitioner's appeal to the BIA, the INS had learned (and both petitioner and his attorney had conceded) that petitioner had provided false information in an application for employment certification and had testified falsely before the IJ on a prior application for suspension of deportation. That fraudulent conduct, the INS argued, precluded petitioner from establishing that he had the good moral character requisite for suspension of deportation. See C.A.R. 116-118, 127-128, 130.

Second, the INS argued that petitioner was precluded from establishing the requisite seven years' continuous physical presence in the United States by the new Section 240A(d) of the INA, 8 U.S.C. 1229b(d) (Supp. V 1999), which was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. That new Section 240A(d) provides that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end

when the alien is served a notice to appear" commencing removal proceedings. 8 U.S.C. 122b(d)(1) (Supp. V 1999). A transitional provision of IIRIRA made that new "stop-time" rule applicable to Orders to Show Cause served on aliens and commencing deportation proceedings under pre-IIRIRA law. See IIRIRA § 309(c)(5), 110 Stat. 3009-627; see also Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, § 203(1), 111 Stat. 2196 (clarifying temporal scope of IIRIRA Section 309(c)(5) as reaching pre-IIRIRA OSCs). Thus, the INS argued, petitioner's statutory period of continuous physical presence ended on the date he was served with the OSC, and petitioner could not establish the requisite seven years' continuous physical presence because the OSC was served on him before he had been physically present here for seven years. See C.A.R. 4.

3. In an order issued on December 14, 1997, the Board of Immigration Appeals affirmed the IJ's decision denying asylum and withholding of deportation, and denied petitioner's motion to remand. Pet. App. A4-A10. First, the BIA agreed with the INS that, under the new stop-time rule added by IIRIRA, petitioner could not establish the seven years' continuous physical presence requisite for suspension of deportation, because his period of physical presence terminated when he was served with the OSC in 1990. *Id.* at A9. In reaching that conclusion, the BIA relied (*ibid.*) on its decision in *In re Nolasco-Tofino*, Interim Dec. No. 3385, 1999 WL 218466 (Apr. 15, 1999), which held that the new stop-time rule applies to applications for suspension of deportation. The BIA's decision in *Nolasco-Tofino*, however, did not expressly address whether an alien could accrue seven years' physical presence *after* the OSC was served.

Second, the BIA alternatively concluded that petitioner could not establish the good moral character necessary for suspension of deportation. In particular, it stated that petitioner "previously gave false testimony while seeking an immigration benefit, and he filed a fraudulent application for suspension of deportation." Pet. App. A9. That conduct, the BIA ruled, "bars [petitioner] from establishing good moral character, a requirement for suspension of deportation." *Ibid.*

4. Petitioner filed a petition for review of his deportation order in the court of appeals. Petitioner argued that, even if he had not accrued the requisite seven years' continuous physical presence before he was served with the OSC in 1990, he had accrued a new period of seven years' continuous physical presence after he was served with that OSC, which made him eligible for suspension of deportation. Petitioner urged the court to reject the BIA's decision in *In re Mendoza-Sandino*, Interim Dec. No. 3426, 2000 WL 225840 (Feb. 23, 2000), issued after the BIA's decision in this case, in which the BIA definitively ruled that the service of an OSC or a notice to appear not only terminates the period of continuous physical presence accrued to that point, but also precludes the accrual of a new seven-year period of physical presence after that point for purposes of proving suspension eligibility.

The court of appeals, in an unpublished decision, rejected petitioner's contentions and denied his petition for review. Pet. App. A11-A14. First, the court held (*id.* at A13) that petitioner's argument that he had accrued a qualifying period of seven years' continuous physical presence after the issuance of his OSC was foreclosed by its decisions in *Afolayan* v. *INS*, 219 F.3d 784, 788-789 (8th Cir. 2000), and *Tang* v. *INS*, 223 F.3d 713, 719 (8th Cir. 2000). Second, the court held that,

regardless of the stop-time rule, petitioner was foreclosed from obtaining suspension of deportation by the BIA's determination that petitioner lacked the requisite good moral character. Pet. App. A13-A14.

ARGUMENT

Petitioner argues that the BIA and the court of appeals erred in concluding that he was barred from eligibility for suspension of deportation by the new stop-time rule enacted in IIRIRA, which provides that any period of continuous physical presence necessary for discretionary relief from deportation ends when the OSC commencing deportation proceedings (or the notice to appear commencing removal proceedings, after IIRIRA) is served on the alien. Petitioner maintains that, because he was in the United States for seven years after he was served with the OSC, he accrued the necessary period of continuous physical presence under the statute. The court of appeals properly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Furthermore, this case would not present a suitable vehicle for resolution of that issue in any event, because both the BIA and the court of appeals determined that petitioner could not be granted suspension of deportation on another, independent basis. Further review is therefore not warranted.

1. To obtain the discretionary relief of suspension of deportation under former INA Section 244(a)(1), 8 U.S.C. 1254(a)(1) (1994), an alien was required to show, at a minimum, that he had accrued seven years' continuous physical presence in the United States, that he was a person of good moral character during that period, and that his deportation would result in extreme hardship to one of certain persons identified in

the statute. Petitioner cannot establish entitlement to suspension of deportation because, as the BIA ruled, he cannot show that he was a person of good moral character (even assuming that he could show that he had accrued a qualifying period of seven years' continuous physical presence after the OSC was served). The BIA found that petitioner had filed a fraudulent application for suspension of deportation. Pet. App. A9. That finding is plainly sufficient to support the BIA's determination that petitioner could not establish his good moral character, and thus cannot establish entitlement to suspension of deportation. And because petitioner cannot make that showing, this case would not present a suitable vehicle for this Court to determine whether petitioner could accrue seven years' continuous physical presence in the United States necessary for suspension of deportation after he was served with the OSC. The BIA's finding that he lacked good moral character constitutes an independent basis for denial of suspension of deportation.

Petitioner argues (Pet. 11 n.1) that this Court should disregard the BIA's adverse finding on the good moral character issue because that determination was based on a letter written to the INS by petitioner's former attorney, and should not be construed as an admission by petitioner. The letter, however, simply recapitulated admissions about false statements that petitioner had made in another proceeding before the INS, see C.A.R. 117, 127, and petitioner is bound by the actions of his counsel, see *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 92 (1990). Petitioner also notes (Pet. 11 n.1) that the false testimony on which the BIA relied to conclude that he lacked good moral character was given on December 10, 1992, seven years and four days before the BIA denied his motion to remand, see

p. 3-4, *supra*. Thus, petitioner argues, the BIA was not precluded by the fact of that false testimony from concluding that he had good moral character during the seven years preceding any grant of suspension of deportation (see 8 U.S.C. 1254(a)(1) (1994)). But petitioner did not thereafter move to purge the record of his false testimony in support of his application. Thus, petitioner can scarcely contend that the BIA abused its discretion in relying on that fraudulent testimony to conclude that his lack of good moral character continued for at least some period of time into the seven-year period preceding its denial of his motion to remand.

2. The court of appeals correctly ruled that petitioner could not establish seven years' continuous physical presence in the United States after service of the OSC. As the BIA concluded in *Mendoza-Sandino*, once the period of an alien's continuous physical presence has been stopped by an event identified in INA Section 240A(d)(1), such as the service of an OSC, it cannot be commenced anew. Relying on the legislative history of IIRIRA, the BIA noted in particular that Congress intended the new stop-time rule to eliminate an aspect of pre-IIRIRA law that created an incentive for aliens to cause delays in their deportation proceedings. Under pre-IIRIRA law, the time that an alien spent in deportation proceedings before issuance of a final order could be counted towards the necessary seven years. See *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981). Thus, aliens had an incentive to prolong their deportation proceedings until that seven-year period had accrued. See H.R. Rep. No. 469(I), 104th Cong., 2d Sess. 390 (1996). Permitting an alien to accrue a new period of seven years' presence after the OSC was served, the BIA concluded, would open up a new avenue for similar abuse, and would thus be con-

trary to Congress's clear intent in enacting the stop-time rule.

Every court of appeals that has addressed that issue has upheld the BIA's application of the stop-time rule in *Mendoza-Sandino*. See *Ram* v. *INS*, 243 F.3d 510, 517-518 (9th Cir. 2001); *McBride* v. *INS*, 238 F.3d 371, 375-377 (5th Cir. 2001); *Afolayan* v. *INS*, 219 F.3d 784, 788 (8th Cir. 2000). As the Ninth Circuit observed in *Ram*, "Congress enacted the stop-time rule in response to a belief that aliens sought to delay deportation proceedings in order to meet the continuous physical presence requirement," and "[a]llowing the clock to restart [after the issuance of the OSC] would permit an end-run around Congress' intent." 243 F.3d at 518; see also *McBride*, 238 F.3d at 377 ("Congress has expressed a desire to reduce the time that an alien can prolong his stay following issuance of a deportation order, a goal clearly furthered by the BIA's interpretation of the stop-time rule.").

Petitioner argues that the court of appeals' decision in this case conflicts with language in *Arrozal* v. *INS*, 159 F.3d 429, 434 n.2 (9th Cir. 1998). In that case, the Ninth Circuit noted, in a footnote to an opinion that vacated on other grounds the BIA's decision not to grant the alien's motion to reopen her deportation proceeding so that she might apply for suspension of deportation, that the alien "might satisfy the continuous physical presence requirement by virtue of the fact that she has accrued twelve years of continuous physical presence *since* the INS issued her an order to show cause." *Ibid.* That observation in the footnote was dictum, however, and has been superseded by the Ninth Circuit's subsequent decision in *Ram*, which

squarely addressed the issue presented here and decided it adversely to petitioner's position.[1]

Petitioner also argues (Pet. 14) that the BIA's application of the stop-time rule would lead to absurd results in certain circumstances, such as applications for suspension of deportation under old INA Section 244(a)(2) filed by criminal aliens deportable under former 8 U.S.C. 1251(a)(2) (1994). Petitioner points out that suspension of deportation under old Section 244(a)(2), 8 U.S.C. 1254(a)(2) (1994), required ten years' continuous physical presence in the United States *following* commission of the criminal act or conviction of a crime rendering the alien deportable; but since the stop-time rule of IIRIRA provides that the pertinent period of physical presence terminates when the alien commits the criminal offense that renders him removable, see 8 U.S.C. 1229b(d)(1) (Supp. V 1999), the result would be that, after IIRIRA, no criminal alien who was deportable under former Section 1251(a)(2) could receive suspension of deportation.

Contrary to petitioner's submission, however, it is not an absurd result that IIRIRA may have made many criminal aliens effectively ineligible for suspension of deportation. Throughout IIRIRA, Congress expressed

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[1] Petitioner observes (Pet. 11-12) that a panel of the BIA, citing that footnote in *Arrozal*, at one point concluded that the stop-time rule did not "explicitly preclude the initiation of another period of continuous physical presence for purposes of relief." See Pet. App. A2. Subsequently, however, the en banc BIA considered the matter more thoroughly and concluded that an alien may not accrue a new period of physical presence after the OSC has been served. The mere fact that the BIA reconsidered the issue and arrived at a different decision does not suggest that its more recent reading is not entitled to deference. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).

an intent that criminal aliens be denied discretionary relief from removal and be removed from the United States as expeditiously as possible. Thus, Congress prospectively repealed suspension of deportation altogether in IIRIRA, and replaced it with cancellation of removal, in 8 U.S.C. 1229b (Supp. V 1999). Especially for aliens such as petitioner who have not been admitted to legal permanent residence, it will be the very rare occasion on which an alien convicted of a criminal offense may receive cancellation of removal. Under IIRIRA, any alien who is not a legal permanent resident and who has been convicted of one of the various criminal offenses that constitute grounds for removal may not receive cancellation of removal. See 8 U.S.C. 1229b(b)(1)(C) (Supp. V 1999). Thus, it is not all peculiar that, for transitional deportation proceedings that were commenced before IIRIRA was enacted but were still pending on that date, Congress would have taken a similarly strict approach to suspension of deportation for aliens who are deportable based on criminal convictions.[2]

[2] Moreover, depending on the circumstances, an alien who had been admitted to lawful permanent residence but who was deportable based on a criminal conviction entered before IIRIRA took effect might remain eligible for discretionary relief under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). See 66 Fed. Reg. 6436 (2001); see also *INS* v. *St. Cyr*, 121 S. Ct. 2271, 2276 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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